SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-686

JILL S. LOESER,

Petitioner,

vs.

JULIUS LOESER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

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TABLE OF CONTENTS

PAGE

OPINIONS BELOW 2

JURISDICTION 3

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT:

I

The Indiana Court had no Jurisdiction over the Petitioner and Minor Child of the Parties 8

II

Petitioner and Her Child were Deprived of a Hearing on the Issue of Child Custody 13

CONCLUSION 17

APPENDICES:

"A"—Opinion of the Indiana Court of Appeals 1a

"B"—Order of the Superior Court of Vigo County, Indiana 10a

Table Of Authorities

Cases

Daben Realty Co., Inc. v. Stewart, 290 N.E. 2d 809 (Ind. App. 1972) 16
Estin v. Estin, 334 U.S. 541, 68 S.Ct. 1213 9
Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972) 15
Application of Gault, 387 U.S. 1, 13, 87 S.Ct. 1429, 1436 (1967) 17
Gilchrist v. Gilchrist, 225 Ind. 367, 372, 75 N.E. 2d 417 (1947) 16
Hess v. Pawlowski, 274 U.S. 372, 48 S.Ct. 362 11
International Shoe Co. v. Washington, 326 U.S. 310, 320, 66 S.Ct. 154, 160 11
Kreiger v. Kreiger, 334 U.S. 555, 68 S.Ct. 1221 9
May v. Anderson, 345 U.S. 528, 73 S.Ct. 840 (1953) 9
McDonald v. MacBee, 243 U.S. 92, 37 S.Ct. 343 11
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15, 70 S.Ct. 652, 657 (1950) 11, 12
Prudential Ins. Co. v. Winans, 308 N.E. 2d 727 (Ind. App. 1974) 16
Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L. Ed. 2d 551 (1972) 14, 15
Wagner v. Wagner, 293 F.2d 533, 536 (1961) 10

Miscellaneous

Indiana Trial Rule 4.1 9
Indiana Trial Rule 4.4 8

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To the Justices of the Supreme Court of the United States:

Petitioner, Jill S. Loeser, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Indiana, First District, affirming the decision of the Superior Court of Vigo County, Indiana, refusing to modify a decree of divorce granting custody of the minor child of the parties to Respondent husband, and on its own motion decreasing Petitioner's rights of visitation and contact with the child.

This cause is a proceeding for divorce in the Courts of Indiana. Respondent husband was granted custody of the minor child of the parties in an ex parte hearing after Petitioner had been improperly defaulted, service having purportedly been made upon her in Illinois by certified mail, the receipt for certified mail having been signed by someone other than Petitioner. There is no evidence as to facts upon which jurisdiction could properly be predicated. No hearing was had on the issue of custody, Petitioner's Petition to Modify the Decree of Divorce regarding the issue of child custody was denied peremptorily, and Petitioner was arbitrarily foreclosed from presenting evidence regarding the change in circumstances of the parties. The Court, on its own motion, reduced petitioner's rights to visitation and contact with the child, even though Respondent has requested no such relief. The judgment was affirmed by the Court of Appeals of Indiana. The Indiana Supreme Court denied a Petition to Transfer.

OPINIONS BELOW

The opinion of the Court of Appeals of Indiana is as yet unreported, and is reproduced as Appendix "A" to this Petition. The order of the Superior Court of Vigo County, Indiana, is unreported, and is reproduced as Appendix "B" to this Petition.

JURISDICTION

The judgment of the Court of Appeals of Indiana was entered on May 29, 1974. A petition for rehearing was filed on June 14, 1974 and denied on July 2, 1974. A petition to transfer to the Supreme Court of Indiana was filed on July 22, 1974 and denied on October 3, 1974. The jurisdiction of this Court rests on 28 U.S.C. §1257(2) and (3).

QUESTIONS PRESENTED

1. Whether a state statute allowing service in a child custody proceeding upon an out of state defendant by certified mail, but not requiring delivery to addressee only, complies with due process of law.

2. Whether a state court has jurisdiction to determine custody of a minor child of the parties in a divorce proceeding where the child has been taken from the jurisdiction of that Court by the consent of the parties prior to the filing of the divorce proceeding.

3. Whether the Court has violated the right of the mother of a child and the rights of the child by entering an order granting custody of that child to the father without hearing any evidence on the issue of the fitness of the parties to custody or on the issue of the best interests of the child.

4. Whether a Court may arbitrarily refuse to hear evidence on the issue of change of circumstances of the parties.

5. Whether the Court has violated the rights of the mother of a child and the rights of the child by refusing to allow the mother to introduce evidence on the changed circumstances of the parties subsequent to the entry of the original custody order.

6. Whether the Court has violated the rights of the mother of a child and the rights of the child by reducing the visitations rights and contacts of the mother with the child on its own motion and without any request for such relief having been made.

STATEMENT OF THE CASE

The parties to this cause, Jill and Julius Loeser, were married on August 25, 1965. A child, Jeffrey Michael, was born to them on January 22, 1968. The parties who were living in Terre Haute, Indiana, commenced having marital difficulties, and on March 26, 1971, the father, with the consent of the mother, took the child to the mother's parents in Highland Park, Illinois. Since that date, the mother has maintained her residence in Highland Park, Illinois.

On April 19, 1971, Julius commenced a suit for divorce in the Superior Court of Vigo County, Indiana. Service of summons upon Jill was allegedly had by certified mail at the address of her parents in Highland Park, Illinois. The receipt for certified mail was not signed by Jill.

On June 4, 1971, Jill filed a suit for separate maintenance in the Circuit Court of Lake County, Illinois. On June 10, 1971, Julius obtained a restraining order without notice to Jill from the Vigo County Superior Court restraining Jill from prosecuting her suit in Illinois, and on June 14, 1971, a temporary injunction to the same effect was issued, again without notice.

On June 21, 1971, the Vigo County Superior Court defaulted Jill, and granted Julius a divorce and custody of the minor child. No evidence was heard at the divorce hearing regarding the issue of custody of the minor child, the Court specifically stating, "We're trying a divorce case here, not a—. . . not a hearing on custody in the future."

Armed with his ex-parte decree, Julius filed a petition for writ of habeas corpus in the Circuit Court of Lake County, Illinois. On July 8, 1971, the Circuit Court of Lake County dismissed Jill's suit for separate maintenance, and entered an order requiring Jill to turn over to Julius the custody of the minor child. No evidentiary hearing was had, the Court's decision being predicated entirely upon the *ex parte* decree which had been entered by the Indiana Court. An appeal was taken to the Illinois Supreme Court which affirmed the decision of the Circuit Court. This Court denied Jill's Petition for Writ of Certiorari. During the pendency of the appeal to the Illinois Supreme Court, the minor child was in the custody of Jill's parents, pursuant to order of Court. After the conclusion of the proceedings there, Jill delivered the minor child to Julius in June, 1972, pursuant to the order of that Court.

On December 11, 1972, for the first time, Jill entered her appearance in the Vigo County, Indiana, Court, for the purpose of seeking modification of the decree, and on December 22 she filed a Petition to Modify the Decree of Divorce requesting that she be given custody of the minor child and requesting child support. What purported to be a hearing on that Petition was held on April 18, 1973. Jill, however, was precluded by the Court from even attempting to prove the allegations of her petition.

At that aborted hearing, the trial court refused to allow Jill to present any evidence concerning events which had

occurred prior to the entry of the decree of divorce. Most significantly, the Court refused to allow Jill to question Julius as to whether it was he who had removed the minor child from the State of Indiana, and chose the place to which the child was taken.

Even further, the trial court refused to allow the plaintiff to introduce any evidence regarding the period of time between the entry of the decree of divorce on June 21, 1971, and June, 1972, when Julius was given actual physical custody of the child, despite the fact that the custody of the child was being held by Jill's parents pursuant to the lawful order of the Supreme Court of Illinois, which had jurisdiction over the cause, stating:

> "At the time this matter was in litigation outside this Court—until this court order was complied with, I think there is nothing in the past that is admissible as far as custody is concerned—change in circumstances. I'm sure that's Indiana law."

When challenged on this ruling by Jill's counsel, the Court rejoined:

> "Are you saying to me that you cannot comply with the terms of the judgment and then come in to change the judgment and use the very methods or the very tactics or the very fact that you created—use that to change the terms after you haven't complied. That violates all the logic of equity and even the sense of finality and enforcibility of judgments.
> "Mr. Bauer: But you had an order out of the Illinois court that Mrs. Loeser abided by.
> "The Court: If I remember right, she lost that one, too."
>
> * * *
>
> "The Court: Well, I'll tell you where the Court stands on this question. As I said before, I'm not going to listen to any evidence—and I don't think it's appli-

> cable at all—any evidence concerning the custody of this child so long as this Court's order was not being followed. As I said, I don't think you can use your own act to bolster your own position when you are not in compliance with the order of the Court. So I'll hear no evidence on this thing other than a change in circumstances that occarred since the time that the plaintiff has had custody of the child."

At the conclusion of the hearing, the Court refused to change the custody of the child. Jill was granted visitation rights one weekend per month, and thirty days during each summer, and one-half of the Christmas vacation. Jill was directed to place not more than one telephone call per week to the child. Jill was further ordered to post a performance bond in the sum of Ten Thousand Dollars ($10,000.00).

The Indiana Court of Appeals affirmed this decision. It held that Jill had been served properly, and had waived any right to present evidence on the original matter of custody by virtue of having been found in default in the original suit.

The Indiana Court of Appeals refused to pass upon whether the trial court had properly foreclosed her from presenting evidence regarding changed circumstances in the period between June, 1971, and June, 1972, on the gound that this issue had not been saved for review, ruling that Jill's post-trial motion did not "set out the question, the objection, the statement of counsel as to what the evidence would be if the witness was permitted to answer, and the court's ruling thereon."

The Court of Appeals held that the evidence on the record was sufficient to sustain the trial court's refusal to modify the divorce decree. The Indiana Supreme Court denied Jill's Petition to Transfer the cause to that Court.

REASONS FOR GRANTING THE WRIT

I.

THE INDIANA COURT HAD NO JURISDICTION OVER THE PETITIONER AND THE MINOR CHILD OF THE PARTIES

This case presents the horrifying picture of a mother caught in a maze of technicalities which completely deprived her of ever having a hearing on the merits of the issue closest to the heart of every parent—the custody of a minor child of tender years. Never, in any Court, has she been allowed to present her side of the question on this issue. At every turn, she was foreclosed from doing so, based upon an original decree of divorce which it is clear was outside the power of the Court to enter in the first place.

Jurisdiction over Jill S. Loeser in the original proceeding was based upon Indiana Trial Rule 4.4, which provides, in pertinent part:

> "(A) Acts serving as a basis for jurisdiction. Any person . . ., a resident of this state who has left the state, . . . submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:
>
> • • •
>
> "(7) living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state."

Service was allegedly made on Jill pursuant to Indiana Trial Rule 4.1, which provides, in pertinent part:

> "(A) In general. Service may be made upon an individual, or an individual acting in a representative capacity, by
>
> "(1) sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgement of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter;"

The return receipt in this cause showed receipt by Jill's mother. There is no evidence in the record that this address was the usual place of abode of either Jill or her mother. There is no evidence in the record that Jill did in fact receive the summons and complaint.

In effect, the postal carrier who delivered the letter was substituted as a person properly authorized to serve summonses. No return of service was required by him, or anyone else which would give to the Court any adequate indication that it was reasonably likely that Jill would receive the summons and complaint. There is no evidence in the record that she did in fact receive such summons or complaint.

The issue here was before this Court in *May* v. *Anderson*, 345 U.S. 528, 73 S.Ct. 840 (1953). There, the Court recognized the doctrine that while a State may have the right to determine the status of the parties in a divorce proceeding, in order to determine the rights to child custody and support or alimony, that State Court must first have jurisdiction of the person of both parties. See also *Estin* v. *Estin*, 334 U.S. 541, 68 S.Ct. 1213 and *Kreiger* v. *Kreiger*, 334 U.S. 555, 68 S.Ct. 1221. In so holding, this Court noted:

> "* * * the weight of authority is in favor of confining the jurisdiction of the court in an action for divorce, where the defendant is a nonresident and does not appear, and process upon the defendant is by substituted service only, to a determination of the *status* of the parties. * * * This rule of law extends to children who are not within the jurisdiction of the court when the decree is rendered, where the defendant is not a resident of the state of the seat of the court, and has neither been personally served with process nor appeared to the action." Id. at 534 (fn. 8)

That this is the well recognized and accepted law is without doubt. As was said by the Court of Appeals for the District of Columbia Circuit in *Wagner* v. *Wagner*, 293 F.2d 533, 536 (1961):

> "Since the former husband was served outside the District of Columbia, an award of support would be 'void except as to property within the jurisdiction of the court which has been specifically proceeded against' in the divorce or maintenance action."

Here, neither the mother nor the child were present in the State of Indiana at the time the divorce proceedings were brought. Indeed, the child had been removed from the State by the *father,* the party bringing the suit. He, by his own actions, deprived the Courts of Indiana of jurisdiction over the minor child. Having done so, he cannot now assert that that court had jurisdiction to determine custody rights to that child, residing in Illinois. The mother was never served within the State, nor did she appear in that divorce proceeding. The order of the Superior Court insofar as it pertained to the custody of the child was absolutely void.

Furthermore, the purported service upon the mother violated due process as well. It is constitutionally required

that service outside of a state give "reasonable assurance that the notice will be actual." *International Shoe Co.* v. *Washington,* 326 U.S. 310, 320, 66 S.Ct. 154, 160; *Hess* v. *Pawlowski,* 274 U.S. 372, 48 S.Ct. 362; *McDonald* v. *MacBee,* 243 U.S. 92, 37 S.Ct. 343. The form of service required varies with the subject matter of the litigation and the nature of the parties. Certainly where we are dealing with the most personal of rights the strictest form of service is required, to assure with certainty that the defendant have actual notice of the proceeding. Especially is this so where the issues deal with not only the rights of the parties to the litigation, but also with the rights of a minor child of tender years.

The guidelines concerning service of process were set down by this Court in *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-15, 70 S.Ct. 652, 657 (1950):

> "Against this interest of the State [in bringing issues to a final settlement] we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis* v. *Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L. Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> • • •
>
> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [citing cases] The notice

> must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance . . . . 'The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' *American Land Co.* v. *Zeiss,* 219 U.S. 47, 67, 31 S.Ct. 200, 207, 55 L. Ed. 82, and see *Blinn* v. *Nelson,* 222 U.S. 1, 7, 32 S.Ct. 1, 2, 56 L. Ed. 65, Ann. Cas. 1913B, 555."

Here it is obvious that the statute involved has no requirement that constitutionally sufficient notice be sent. Nor was constitutionally sufficient service accomplished here. The mailing used was not limited to delivery only to the wife, nor did she in fact receipt for the mailing. There is nothing in the record to even indicate that the mailing was sent to the wife's actual residence.

Clearly the original order of child custody was void. This Court should grant certiorari in this case to declare once and for all the type of service which is required upon out of state persons in connection with child custody matters. Should this decision of the Indiana Courts, and others like it, stand, untold harm will continue to occur in connection with the most personal of rights—rights of parents to their children. It cannot be emphasized enough that the rights of the children involved are perhaps paramount in such cases. Their rights must be protected properly. Allowing Courts which do not have jurisdiction over such children to determine such rights visits a great injustice upon such children, and fails to grant them the protection to which they are constitutionally entitled. On this ground alone certiorari ought to be granted.

II.

PETITIONER AND HER CHILD WERE DEPRIVED OF A HEARING ON THE ISSUE OF CHILD CUSTODY

Never has a full and fair hearing been held on the issue of the custody of this child, either in the Indiana or Illinois courts, or anywhere. The original divorce hearing contains no evidence whatsoever regarding the best interests of the child, or the fitness of either parent to have custody of that child. Feeling itself precluded from hearing the matter on the basis of the order entered in that cause, the Illinois Courts refused to hear any evidence upon that issue. When Petitioner applied to the Indiana courts in this proceeding, she was foreclosed from presenting evidence on this question. The Superior Court allowed her to present evidence only dating from the time that the child's custody had been turned over to the father, and nothing relating to the entire period prior thereto. She was not given an opportunity to present any evidence of her fitness to have the child, or his attitude and actions while he was in her custody, after the decree of divorce had been entered. Furthermore, the trial Court, on its own motion, and without the hearing of evidence thereon, limited plaintiff's communication with her young child. Whereas she had been allowed by the father to telephone the child every evening, the Court limited her in this respect by allowing her only one telephone call per week. The reasons for the trial court's rulings in this regard are clear. He was angered by the fact that the wife had commenced certain litigation in Illinois regarding these same issues and had retained custody of the child for a period of time. He based his rulings upon a punitive attitude which is clearly not sanctioned by any approach to the law, particularly as it

relates to the rights of children and parents. He found the plaintiff, in effect, guilty of contempt for failing to obey the order of his Court (which the Court had no jurisdiction to make), even though her custody of the child was pursuant to the lawful orders of the Illinois courts during the pendency of proceedings in those courts. She complied at all times with all orders of the Illinois Courts, which had jurisdiction over all parties. Such a punitive attitude must be condemned.

Thus, plaintiff was penalized by the Indiana trial court because she had resorted to the Illinois Courts for relief in this matter. At all times, she complied with the orders of the Illinois courts. She was punished for resorting to the Courts for a proper adjudication of the matters at issue. As a result of this ruling, she was deprived of the opportunity to testify to anything that had occurred while the child was lawfully in her custody pursuant to the orders of the Illinois Court, a period of fourteen months, which had a significant bearing upon the life and lifestyle of a child of such tender years. Such a punitive attitude toward litigation has never been countenanced. It must not be the basis of any final determination in a situation like the present one.

This Court condemned any such approach to child custody in *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L. Ed. 2d 551 (1972). There, the Court struck down a presumption that an unwed father was unfit to have the custody of his children. The Court stated the interests regarding child custody thusly:

> "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing in-

terest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' *Kovacs* v. *Cooper*, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L. Ed. 513 (1949) (Frankfurter, J., concurring).

"The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . and '[r]ights far more precious . . . than property rights,' . . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment, ..." (citations omitted)

That case, of course, dealt with a dispute between a parent and the State. No less are the rights of each parent of a child because the dispute is between the two of them. Each has the same rights and liabilities, and each is entitled to a full and fair hearing before they may be deprived of those rights. This was made clear by this Court in the context of the right to chattels in *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L. Ed. 2d 556 (1973), where it was said: "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods." Id. at 87, 92 S.Ct. at 1997-98. How much more important are the rights to the custody of a child.

The impropriety of these rulings was of course raised in the Indiana Court of Appeals. The rulings of that Court, however, are more inexplicable. That court recognized that the child's "welfare and best interest are the paramount and controlling considerations in all disputes over the custody of the child." *Gilchrist* v. *Gilchrist*, 225 Ind. 367, 372, 75 N.E. 2d 417 (1947). Yet, it then proceeded to ignore this principle, in ruling that the wife had not properly preserved her objections to the evidentiary rulings for review. A more technical ruling than was made by the Indiana Court of Appeals can hardly be imagined. It held that citing the substance of the objection in the wife's post-trial motion was insufficient to preserve the grounds on appeal, but that the specific question, ruling and offer to prove must be set out verbatim in that motion. Thus, this procedural technique was used to foreclose the wife, the mother, from a hearing on the merits of her claim. This is yet another denial of due process. Indeed, there is a serious question that this ruling was correct under Indiana law. *Daben Realty Co., Inc.* v. *Stewart*, 293 N.E. 2d 809 (Ind. App. 1972); and *Prudential Ins. Co.* v. *Winans*, 308 N.E. 2d 727 (Ind. App. 1974). Certainly, Petitioner could not have anticipated such a ruling. To deprive her of a hearing on the merits on an obviously improper ruling upon such a ground is outrageous. Indeed, such a ruling is much more egregious than that condemned in *Stanley*, where the Illinois law raised only a presumption, which the parent had an opportunity to rebut. In short, the Indiana Courts have raised one procedural stumbling block after another to deprive Petitioner here of any hearing on an issue of the utmost constitutional and human concern. Such an obvious miscarriage of justice cries out for correction. This Court presents the last opportunity for redress.

CONCLUSION

Jill Loeser has been subjected to a series of rulings which have so obviously deprived her of due process as to shock the conscience of any thinking person. That they have been made in the name of procedural requirements is doubly unconscionable. Not once has she been able to have a full determination of the most basic of rights—the rights of a mother to the custody and companionship of her child. The deprivation of such custody stems from one obviously void order entered by a court which not only had no jurisdiction or power to enter such order, but also held no hearing in connection with the relief which it granted. Not only have the rights of Jill Loeser been denied, but her minor child has been similarly denied the rights to a judicial determination of his best interests. The bill of rights is not for adults alone. *Application of Gault,* 387 U.S. 1, 13, 87 S.Ct. 1429, 1436 (1967). The child's rights have received no attention whatsoever. A State in which he did not live has taken him from his mother, without proper service, and without hearing, and without any opportunity to correct the situation. Are his rights to be so cavalierly ignored? Is he to be callously shunted aside as having no interest in these proceedings? Is he not to have his day in Court? Is his mother to be deprived of all of her rights?

The checkered history of this case is a judicial nightmare. Due Process has been ignored in the name of procedure, and the false sense of dignity of a judge. Such actions must not be allowed to occur in what purports to be a free society dedicated to justice for all.

Wherefore, petitioner prays that this Court's Writ of Certiorari issue and that the judgment below be reversed, and that Petitioner be given an opportunity for a fair hearing in a court of competent jurisdiction.

Respectfully submitted,

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APPENDIX "A"

Opinion of the Indiana Court of Appeals

LOWDERMILK, J.

Defendant-appellant, Jill S. Loeser, and plaintiff-appellee, Julius Loeser, will be hereinafter referred to as "Jill" and "Julius" and the minor child of the parties as "Jeffrey."

Jill and Julius were married August 28, 1965, and Jeffrey was born to this union on January 22, 1968. The marriage was not one of bliss and happiness and Jill and Julius had marital difficulties which resulted in Julius taking Jeffrey to Highland Park, Illinois, to Jill's parents on March 26, 1971. Jill has since that time resided with her parents at their Illinois residence and she kept custody of Jeffrey until ordered by an Illinois court to give Jeffrey to Julius, about the 22nd day of May, 1972.

On April 19, 1971, Julius filed suit for divorce in the Superior Court of Vigo County, and proof of service of summons and process on Jill was made by the clerk's return of service of summons by mail, together with return receipts. On June 4, 1971, Jill filed suit for separate maintenance and custody of Jeffrey in the Circuit Court of Lake County, Illinois. On June 10, 1971, Julius obtained a restraining order without notice from the Vigo Superior Court which prohibited Jill from further prosecution of her action in Illinois. A temporary injunction was issued on June 14, 1971.

Then, on June 21, 1971, the Vigo Court granted Julius a divorce after a hearing at which Jill defaulted. Jill did

not appear in the divorce action, as she said, because of the way she had been treated in Terre Haute and because her attorneys advised her that the courts of Illinois had jurisdiction of the action. She knew she was charged with the misconduct of adultery and did not want to face it at that time.

A Terre Haute attorney had been employed by attorney Arthur Morse of Chicago to consult with him in regard to the course of action Mr. Morse should take in respect to Jill. Neither said Terre Haute attorney nor Mr. Morse appeared of record on Jill's behalf; however, the Terre Haute attorney was in the court room as an observer and was called as a witness by Julius at the trial. He testified that attorney Morse had told him that he would not appear in the cause and no one should appear in Jill's behalf.

On June 28, 1971, Julius filed a petition for writ of habeas corpus in the Circuit Court of Lake County, Illinois, and on July 8th of that year in that cause the Lake Circuit Court dismissed Jill's separate maintenance suit and entered an order requiring Jill to deliver Jeffrey to Julius. That case was decided on the question of jurisdiction.

Jill took that case to the Illinois Supreme Court on the day the judgment was made against her and on July 14, 1971, the Illinois Supreme Court issued an order staying the writ of habeas corpus and ordered Jeffrey to be placed in the custody of Jill's parents, Leonard and Gladys Scheyer, and granted Julius visitation, one week each month in Chicago.

The Illinois Supreme Court, on May 22, 1972, affirmed the decision of the Lake Circuit Court and later set aside

its stay order and Jill delivered Jeffrey to Julius. She was allowed to have Jeffrey visit for one week each month in Illinois.

Jill filed a petition for writ of certiorari in the United States Supreme Court and the same was denied on November 13, 1972. Thereafter, Jill was allowed by Julius to visit Jeffrey every other weekend at Julius' residence in Terre Haute.

During this litigation and from March 26, 1971, until June of 1972, Jill had the physical custody of Jeffrey; after June, 1972, Julius had the physical custody and charge of Jeffrey.

Jill's appearance was entered by her Terre Haute attorney in Vigo County on December 11, 1972, and on December 22nd of that year she filed her petition to modify the decree, which was heard on April 18, 1973.

Appellant Jill's brief contains much of the evidence covering the facts of the divorce case. However, we shall consider that evidence as surplusage in the appeal before us inasmuch as Jill's motion to modify the decree as to custody is all that is before this court.

Jill's motion to correct errors was timely filed, consists of six specifications, together with a memorandum of reasons and is directed to the petition to modify the custody under the decree.

On August 3, 1972, the trial court overruled the motion to correct errors and Jill did, on August 20, 1973, file her praecipe for a full and complete transcript of the entire record of the cause, beginning with plaintiff's complaint for absolute divorce.

(Appendix "A")

Jill has consolidated for argument specifications of her motion to correct errors 1, 2, 3, and 6, and we shall treat them as one under Ind. Rules of Procedure, Appellate Rule 8.3(A)(7), which specifications raise the following issue; did the trial court commit error by refusing to hear evidence at the hearing on the petition to modify relating to matters which occurred prior to the granting of the divorce decree? Jill argues that the trial court did not have before it sufficient evidence at the trial of the divorce to properly make a determination as to the custody of Jeffrey. Jill contends that since the divorce was *ex parte*, she has had no opportunity to present evidence relating to matters prior to the granting of the divorce decree.

However, it is our opinion that Jill cannot be now heard to complain that she had no opportunity to present evidence at the trial of the divorce case. The record discloses that Jill was properly served and had notice of the trial and, in fact, had her Indiana attorney present at the trial as an observer. The Indiana attorney had specific instructions not to enter an appearance on Jill's behalf. Jill had the opportunity and right to be heard and present evidence at the trial and it was by her choice that she did not exercise such rights and cannot now be heard to complain.

In the case of *Dufour* v. *Dufour* (1971), ... Ind. ....., 273 N.E. 2d 102, 104, 105, our Supreme Court held:

> ". . . It is a well settled rule of law that the modification hearing cannot be used to retry the issues settled by the divorce decree. . . .
>
> • • •

(Appendix "A")

> Accordingly, testimony regarding the appellant's conduct prior to the original divorce decree was inadmissible in the modification hearing, and does not, therefore, support the trial court's decision."

This is further borne out by the case of *Huston* v. *Huston* (1971), ... Ind. ....., 267 N.E. 2d 170, wherein it was held that a change of custody must result from changes in conditions since the last court order which necessitates a change of custody, for the welfare of the children.

Thus, it is clear that the trial court properly excluded evidence of conduct of the parties prior to the last court order (the divorce decree).

Appellant Jill's specifications of error 4 and 5 have been consolidated by her in her brief and argued together. These specifications, briefly, are that the court erred in not permitting Jill to present evidence to show a change of conditions as to Jeffrey's welfare while in her custody and the custody of her parents while in Lake County, Illinois, from and after the rendition of the divorce in Vigo County, Indiana, in June of 1971, to June of 1972, at which time the custody of Jeffrey was returned to Julius at Terre Haute.

Jill contends she was punished for pursuing her Illinois action by exclusion of her evidence during the year Jeffrey was out of the jurisdiction of the court and after she had purged herself of any contempt of the Indiana court by delivering her son to Julius.

Julius first contends on this issue that Jill failed to make a proper offer to prove at trial. An examination of the record discloses that when Jill did attempt to introduce

evidence relating to the one year period in question, the trial court sustained an objection to any such evidence and informed the parties that no such evidence would be heard. Counsel for Jill made it clear to the court what the evidence was intended to prove, although he did not make it in the words of an offer to prove in the usual and accepted form of offer to prove as established by usage and custom in Indiana.

Without deciding whether the offer to prove was sufficient to save the question in the trial court, and assuming arguendo that the offer to prove was sufficient, we must first decide whether this issue has been properly saved for appeal.

Julius also urges that Jill has failed to comply with Ind. Rules of Procedure, Trial Rule 59, Motion to Correct Errors, (B), which reads as follows, to-wit:

> "(B) Form of motion. A motion to correct error shall state the issues upon which error is claimed, but the issues are not required to be stated under or in the language of the reasons allowed by these rules, by statute or by other law. The statement of claimed errors shall be specific rather than general, and shall be accompanied by a statement of the facts and grounds upon which the errors are based."

We are now confronted with the problem of whether Jill did or did not save her record on this issue in her motion to correct errors. A careful review of the motion to correct errors, together with the memorandum made a part thereof, discloses a complete failure to set out the question, the objection, the statement of counsel as to what the evidence

would be if the witness was permitted to answer, and the court's ruling thereon.

The case of *Daben Realty Co., Inc.* v. *Stewart* (1972), ... Ind. App. ....., 290 N.E. 2d 809, 812, in speaking on this proposition, states:

> "Nowhere in the motion nor in appellant's brief is the question or the plaintiff's objection set out, either in substance or verbatim.
>
> Trial Rule 59(B), IC 1971, 34-5-1-1, requires that '[t]he statement of claimed errors [in the motion to correct errors] shall be specific rather than general . . . .' This rule, we believe, preserves the pre-existing case law requirement that:
>
> > '" In order to preserve for review the refusal of the court to permit a witness to answer a question on direct examination, *the motion for new trial must show the question, the objection, and the offer to prove what evidence would have been given by the witness in answer to the question.*" . . .'
>
> Appellant's failure to comply with the rule results in nothing being presented to us for review. . . ." (Our emphasis.)

See, also, *State* v. *Haldik* (1973), ... Ind. App. ....., 302 N.E. 2d 544.

In the case of *Bennett* v. *State* (1973), ... Ind. App. ....., 304 N.E. 2d 827, this court, in passing on the requirement of saving a question for appeal by properly setting it out in the motion to correct errors, said:

> "While the motion to correct errors serves as the complaint on appeal, its primary purpose is to afford

the trial court the opportunity to rectify errors it has committed. *Bud Gates, Inc.* v. *Jackson* (1970), 147 Ind. App. 123, 258 N.E. 2d 691.

Without being informed by a specific statement of the facts and grounds on which the claimed error is based, the trial judge cannot rectify his errors, if any. Were it otherwise, an appellant could propel himself into this or the Supreme Court by general statements of claimed errors, detailed at leisure after his motion to correct errors is overruled. . . ."

This question is jurisdictional and although the question, objection, court's ruling, and an informal offer to prove have been set out in the brief the same is inadequate to preserve the question on appeal as a waiver has already taken place by the failure to follow the requirements of TR. 59 (B) in the motion to correct errors.

The third issue is a compilation of specifications of error numbered 1, 2, 3, 4, 5, and 6, and is whether the trial court in its ruling abused its discretion and the ruling was contrary to law in that it failed to change custody of the minor child to Jill.

Our Supreme Court held, in the case of *Gilchrist* v. *Gilchrist* (1947), 225 Ind. 367, 372, 75 N.E. 2d 417, as follows:

". . . The rights of parents, however, are not absolute. They must yield to the welfare of the child. Its welfare and best interest are paramount and controlling considerations in all disputes over the custody of the child. [Cases cited omitted.] The disposition of children is not controlled by hard and fast rules of law but by the exercise of the sound judicial discretion of the court

confronted with the problem. Review by an appellate court of such disposition is limited to the question of abuse of judicial discretion. [Cases cited omitted.]"

The evidence as to Jeffrey's conduct, behavior and well being and as to his best interests is conflicting. It is elementary that this court does not weigh the evidence. There is adequate evidence upon which the trial court could find as it did.

The case of *Brickley* v. *Brickley* (1965), 247 Ind. 201, 204, 210 N.E. 2d 850, relates as follows:

> "While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.
>
> On appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal. . . ."

Judgment affirmed.

ROBERTSON, P.J. and LYBROOK, J. concur.

APPENDIX "B"

Order of the Superior Court of Vigo County

The Court, having heretofore heard the evidence in this cause relative to Defendant's petition to modify the decree entered by this Court on June 21, 1971, and now being sufficiently advised, denies said petition insofar as custody of the minor child of the parties is concerned. It is hereby Ordered that said decree be modified as to visitation rights as follows:

1. Defendant shall have the right to have the minor child of the parties, namely Jeffrey Loeser, now age five years, visit with her one weekend per month, from Friday evening until Sunday afternoon at 4:00 P.M. following.

2. Defendant shall have the right to have the child visit with her for thirty (30) consecutive days during the summer vacation, such visitation to be arranged at least one month prior to the visitation period. During the time said child is with Defendant, Plaintiff shall pay directly to Defendant the sum of One Hundred Dollars ($100.00) per week for the support of said child.

3. Defendant shall have the right to have the child visit with her for one-half (½) of the Christmas vacation each year, said visitation to be arranged and agreed upon thirty (30) days prior to the beginning of the vacation period.

4. Defendant is directed to limit telephone calls to said child to not more than one (1) call per week.

(Appendix "B")

5. This order effective upon Defendant posting with the Court a performance bond in the amount of Ten Thousand Dollars ($10,000.00) guaranteeing strict compliance with this Order, surety on said bond subject to the approval of the Court. Said bond shall be effective for a term of one (1) year and subject to renewal from year to year or to cancellation upon satisfactory compliance with the terms of this Order.

6. Otherwise, the decree heretofore entered shall remain in full force and effect.

So Ordered this 3rd day of May, 1973.